FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 15 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 190

ZACHARY BOZZA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

HAROLD SIMANDL
Attorney for Petitioner,
24 Branford Place,
Newark 2, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

INDEX

	PAGE
I. Summary Statement of the Matter Involved	1
First Count	2
Second Count	2
Third Count	2
Fourth Count	2
Fifth Count	3
II. Jurisdictional Statement	7
III. Questions Presented	7
IV. Reasons for Allowance of the Writ	8

Cases Cited.

Anderson v. *United States*, 30 Fed. (2d) 485	9
Allison v. *United States*, 160 U. S. 203	15
Bartholemew v. *United States*, 177 Fed. 902, Certiorari denied 217 U. S. 608, 54 L. Ed. 901, 30 Sup. Ct. 697	13
Flynn v. *United States*, 50 Fed. (2d) 1021	13
Galloway v. *United States*, 319 U. S. 379	12
Jordan v. *United States*, 60 Fed. (2d) 4, Certiorari denied 287 U. S. 633, 77 L. Ed. 545, 33 Sup. Ct. 84	12
Kelly v. *United States*, 61 Fed. (2d) 843	12
Linningen v. *Morgan*, 241 Fed. 645	13

PAGE

Mangiaracina v. *United States*, 40 Fed. (2d) 164 ... 12
Matchok v. *United States*, 60 Fed. (2d) 266 12
Nancy v. *United States*, 16 Fed. (2d) 872 13
Partson v. *United States*, 20 Fed. (2d) 127..... 9
Patrilo v. *United States*, 7 Fed. (2d) 804 12
Quercia v. *United States*, 289 U. S. 464 15
Reynolds v. *United States*, 98 U. S. 145 14
Roberts v. *United States*, 320 U. S. 264 13
Seiden v. *United States*, 16 Fed. (2d) 197 .....10, 12, 13
United States v. *Benz*, 282 U. S. 304 13
United States v. *Cooper*; Fed. Cas. 14,863, 25 Fed. Cas. 627 11
United States v. *Logan*, Fed. Cas. 15,624, 26 Fed. Cas. 992 ..... 10, 11,
United States v. *Simmons*, 96 U. S. 360 9

FEDERAL STATUTES AND RULE.

Judicial Code, Section 240(a) 7
Rules of Criminal Procedure, Rule 37(b) 7
Title 26 I. R. C. Section 2833a 2, 10
Section 2803 3
Section 2810a 2
Section 2834a 2
Section 3321a 2
Title 28 U. S. C. Section 347(a) 7
Title 26 U. S. C. A. Section 2831 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

ZACHARY BOZZA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

I.

Summary Statement of the Matter Involved.

A. Petitioner, together with Nicholas Chirichillo, Ellen Vettor and Peter Milito were called to trial in the United States District Court for the District of New Jersey upon an indictment that contained five counts, in substance charging (R. p. 6, *et seq.*)

First Count.

That on or about the 19th day of January, 1945 at Woodbridge Township in the County of Middlesex, State and District of New Jersey, they did unlawfully engage in and carry on the business of a distiller, and did then and there distill a quantity of spirits subject to tax with intent wilfully to defraud the United States of such tax on spirits so distilled by them in violation of Title 26 I. R. C., Section 2833a;

Second Count.

That at the same time and place, they did wilfully have in their possession, custody and under their control, a certain set-up still which they failed and neglected to register with the District Supervisor of the Alcohol Tax Unit, contrary to the provisions of Title 26 I. R. C. Section 2810a;

Third Count.

That at the same time and place, they did wilfully and unlawfully make and ferment a quantity of mash fit for distillation in a said building, not then and there a distillery, in violation of Title 26, I. R. C. Section 2834a;

Fourth Count.

That at the same time and place, they did wilfully, knowingly and feloniously, and were concerning in the concealment of about 2½ gallons of distilled spirits for and in respect whereof a tax had been imposed and which said tax had not been paid, with intent to defraud the United States of such tax in violation of Title 26 I. R. C., Section 3321a;

Fifth Count.

That on or about January 7, 1945 in the Township of Woodbridge, Nicholas Chirichillo and Zachary Bozza, did wilfully, knowingly and unlawfully transport and were concerned in the transportation of 35 gallons of distilled spirits for and in respect whereof a tax had been imposed by law, which said tax had not been paid nor did the containers thereof have affixed thereto, a stamp etc. with intent to defraud the United States of tax, in violation of Title 26 I. R. C., Section 2803.

The Trial Court had dismissed Count 6 of the Indictment (R. p. 2).

B. Upon motion of the government, the Trial Court ordered a serverance as to the defendant, Ellen Vettor (R. p. 1).

She testified for the government.

In March, 1944, she commenced serving as a housekeeper for Chirichillo at 213 Center Street, Elizabeth, New Jersey (R. p. 10). In October 1944, he told her he was going to manufacture alcohol (R. pp. 13, 33). He told her he intended renting the old farm-house located on Cleveland Avenue in Woodbridge Township, New Jersey, owned by a Mrs. Collacaro, for that purpose (R. p. 12). She was present when he arranged the letting with Mrs. Collacaro and paid her the rent (R. pp. 11, 32). She and Chirichillo took possession of the farm house in October. The only furnishings they placed in it was a studio couch which they took from Chirichillo's apartment in Elizabeth (R. pp. 11, 34). She remained at the farmhouse until she went to the

hospital in January, 1945 (R. p. 14). In November, after they took possession of the farmhouse, she saw Chirichillo, a man named Dominick and another party (who was not in Court), carry still parts into the farmhouse (R. pp. 13, 14, 15, 25). Chirichillo purchased a 1936 Ford Sedan and used it to bring the still parts to the farm (R. p. 24). Chirichillo erected the still (R. p. 15). It took him at least a month to construct it, and it was finished by the latter part of November (R. p. 25). Chirichillo then brought in the sugar, coal and other supplies for operating the still (R. pp. 14, 21). Chirichillo (and no one else) made the mash (R. pp. 16, 33). She saw him place the sugar, water and yeast in the mash tanks and vats located in the attic of the building (R. pp. 16, 33). At first, she said she saw no one else at the still (R. p. 14). Then she said Dominick and Chirichillo did the cooking during the day (R. p. 22). Chirichillo manufactured, Dominick and "Jack Bozza" helped out (R. p. 15). "Bozza wasn't there every day in the week. He would just come around between two and three times a week . . . He was not there steady. He would take instructions from Chirichillo and just help him around" (R. pp. 18, 22). The alcohol was placed in cans and carted away by Chirichillo and Pete Milito (R. p. 17). Chirichillo and others, (not Bozza) would load the cans in the automobiles (R. pp. 17, 18). She had no housework to do at the farm, and she denied she worked at the still (R. pp. 36, 40). She devoted most of her time to drinking the alcohol that was manufactured (R. pp. 41, 35, 34). She drank a quart of the alcohol almost daily. Chirichillo would prepare bottles containing alcohol and water for her. (R. p. 43) Two such bottles found in the kitchen by the inspectors contained 182.8 proof alcohol.

In January, 1945, after Chirichillo had left the farmhouse, she went to the second floor and opened a can and drank some of its contents. "It wasn't good" (R. p. 30). She began to turn purple, and when Chirichillo saw her upon his return, he took her to the Rahway General Hospital (R. p. 30, 31). She was in a coma upon her admission (R. p. 84). While she was at the hospital, she was questioned by an investigator (R. p. 31). She remained in the hospital about a week, and was removed to the Middlesex County Workhouse.

Shortly after midnight, January 17th, she accompanied a group of officers of the State Department of Alcoholic Beverage Control, and pointed out the farmhouse to them. (R. p. 14) They entered the house, found it barren of furniture or furnishings except a cot with a couple of old blankets on it. (Tr. pp. 8, 43) On the second floor they found a still of approximately 300 gallon capacity set up, but not in operation. In the attic they found 6 empty galvanized vats, and twelve 100 gallon hogsheads, 6 of them filled with fermenting sugar mash. (Tr. pp. 21, 22) In the cellar they found a boiler, but there was no fire in it. (Tr. p. 13)

In her statement to the investigators she had mentioned a man called "Jack." (R. p. 40) There was no proof that Bozza was ever known as "Jack." (R. p. 40) About 10 days prior to the trial, she was incarcerated in the Hudson County Jail. (R. pp. 37, 10) There, she was shown about 55 photographs by an Agent. (C. pp. 40, 42) Among them was the picture of the defendant, Bozza. (C. p. 40) From the time of her arrest in January, 1945 until the day she entered the Courtroom, she had never been

brought face to face with Bozza and asked to identify him. (R. p. 43) The defendant, Milito is a farmer who owns a neighboring farm. (Tr. p. 63) Each year he rented Mrs. Collacaro's ground. (Tr. pp. 63, 64) He denied he was acquainted with Bozza, and insisted that the first time he ever met Bozza was in the Courtroom. (R. p. 57) He never saw Bozza at the Collacaro farm. (R. p. 62) He categorically denied the charges. (R. p. 51) Chirichillo denied that he knew Bozza or had met him prior to the day they were called upon to plead to the indictment. (R. p. 88) He denied that he ever met Bozza at the Collacaro farm. (R. pp. 78, 88)

The Trial Court directed a verdict acquitting the defendant, Milito. (R. pp. 2, 92, 94) Petitioner and Chirichillo were found guilty on all counts.

On the morning of July 23, 1945, petitioner was sentenced on the first, second and third counts, to imprisonment for a period of 2 years on each; and on the fourth and fifth counts to imprisonment for a period of two years and six months on each, all of the sentences to run concurrently. (R. p. 115)

Thereafter, petitioner entered upon the service of his sentence (Stipulation, R. pp. 116, 117). Subsequently, on the same day, petitioner was brought before the Judge, who increased the punishment by imposing on Count 1 a fine of $100., on Count 2 a fine of $100. and a penalty of $500., and on Count 3 a fine of $500 (R. pp. 3, 116, 117).

II.

Jurisdictional Statement.

An appeal was taken to the Circuit Court of Appeals for the Third Circuit, which on May 17, 1946, filed its opinion wherein the conviction and sentence on the first three counts was affirmed, but the conviction and sentence on the fourth and fifth counts was reversed, and the cause remanded for entry of judgment of acquittal on those counts (R. pp. 137a, 145a).

The opinion of the Court below has not yet been reported.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule 37 (b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

III.

Questions Presented.

The questions presented are:

(1) Whether a mere casual employee or laborer who works at an illicit still, but who has no ownership, title or interest in the still, its operation or its product, can be held to be engaged in carrying on the business of a distiller, with intent wilfully to defraud the United States of tax, and punished as a "principal."

(2) Whether a mere casual employee or laborer, who works at an illicit still, always in the presence of and with his employer, (the owner and proprietor of said still), can be held to have "aided and abetted" the "possession, custody and control" of the still and be punished as a "principal," for failing to register it with the District Supervisor.

(3) Whether the Trial Court was bound to direct a verdict of acquittal where the undisputed proof affirmatively established the innocence of the petitioner of the charge laid in the Third Count of the indictment.

(4) Whether the Trial Court, in imposing sentence, having made a technical error, of which petitioner did not complain, could increase petitioner's punishment after petitioner commenced to serve said sentence.

(5) Whether portions of the Trial Judge's charge delivered in the form of an animated argument went beyond permissible limits and amounted to acts of advocacy in favor of the government.

(6) Whether there was sufficient competent testimony of petitioner's guilt to justify the submission of the case to the jury, on the first, second and third Counts of the indictment.

IV.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals decided that Chirichillo directly committed the offense charged in the first count, and that petitioner aided, abetted or counselled him in committing it (R. p. 140a). Chirichillo was the pro-

prietor and employer of petitioner. There was no proof that petitioner had a financial interest in the still, its product or anything at the farmhouse. In fact, there was not a scintilla of evidence that he had the financial means of acquiring such an interest. There was no evidence that he was in any wise liable for the tax or that he had an inducement or purpose to defraud the government out of the tax on the product that was distilled. His sole interest was the daily wage that he might receive.

In *United States* v. *Simmons*, 96 U. S. 360, 364, this Court held:

> • • • "punishment is not inflicted merely or solely because of the intent to defraud. It is the act of engaging in the distillation of spirits, combined with that intent, which constitutes the offence."

The decision in the case at bar conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Anderson* v. *United States*, 30 F. (2d) 485 where that Court held:

> "One who is a mere employee may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice, and therefore regarded as a principal, in conducting a business, unless he is in fact one of the proprietors whose duty it is to pay the license tax."

It is also in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Partson* v. *United States*, 20 F. (2d) 127, where that Court held:

> "There was no evidence that the defendant had any financial interest in any of the real or personal

property in or on the Clausen farm, except his clothes, or in the business thereof, except his interest in his hourly wages.

The act of Congress under which he was indicted was a revenue act, the purpose of the section under which he was indicted was to prevent a distiller from defrauding the government out of the tax upon the product which he manufactured, and the defendant's intent to defraud was a condition precedent to his commission of the effense the section denounces. Partson had no interest in the property or the business. He was not and would not be liable for the tax, because neither the plant nor the product nor any part of it was or would be his property. There was no substantial evidence that he had any inducement to or purpose to defraud the government out of that tax. He was presumed to be innocent of any such intent and a studious review and consideration of all the evidence has forced our minds to the conclusion that all the substantial evidence in this case is not only as consistent with, but is more consistent with, innocence on his part than with his guilt of any intention to defraud the government out of the tax on the product Mr. Clausen was making."

Discussing Title 26, I. R. C., Section 2833a, upon which the first count was based, the Circuit Court of Appeals for the Second Circuit in *Seiden* v. *United States*, 16 F. (2d), page 197 said:

> "This section was plainly directed only against the proprietor, and a workman cannot commit or abet it."

In *United States* v. *Logan*, (C. C. E. D. Tenn.), Fed. Cas. 15,624, 26 Fed. case, page 992 the Court held:

> "but if the proof shall also show that the defendant was not the proprietor and had no interest in the distillery, and was only employed by some other person as a laborer, in carrying on the work of distilling, then in law he can not be said to be carrying on the business of a distiller."

c/f *United States* v. *Cooper,* (C. C., E. D. Tenn.) Fed. Cas. No. 14,863, 25 Fed. Cas., page 627.

That Congress did not intend to hold a person who merely worked in an illegal still to the same standard of culpability as its proprietor, is evidenced by the fact that Congress has prescribed a maximum of six months imprisonment for those convicted of working in an illegal distillery. Title 26 U. S. C. A., Sec. 2831.

2. The Circuit Court of Appeals decided that Chirichillo directly committed the offense charged in the second count, and that petitioner aided, abetted or counselled him in committing it. (R. p. 140a)

There was no proof that petitioner was ever alone with the still. The evidence established that on each occasion that petitioner was present at the still, Chirichillo, his employer, was also present directing him.

Chirichillo was therefore exclusively in possession, custody and control of the still. Petitioner's services as an employee did not convert Chirichillo's exclusive possession, custody and control, into a joint possession, custody and control of himself and Chirichillo, within the meaning of the law.

The decision in the case at bar is in direct conflict with the decision of the 2nd Circuit in *Seiden* v. *United States,*

16 Fed. (2nd) 197, and the decisions of the 8th Circuit in *Patrilo* v. *United States*, 7 Fed. (2nd) 804; *Mangiaracina* v. *United States*, 40 Fed. (2nd) 164; *Kelly* v. *United States*, 61 Fed. (2nd) 843. In the *Mangiaracina* case, the 8th Circuit, at page 167, approved the following:

> * * * "If one is a mere employee of another who exclusively has control and possession of a still, then that person who is a mere employee is not guilty."

(3) The Circuit Court of Appeals decided that petitioner aided, abetted or counselled Chirichillo in committing the offense charged in the third count, (R. p. 140a) although the evidence affirmatively established that Chirichillo *alone* made the mash (R. pp. 16, 33). This Court has held that mere speculation must not be allowed to do duty for probative facts. *Galloway* v. *United States*, 319 U. S. 379. By any measure, it was the plain duty of the Trial Court to direct a verdict of acquittal as to this count.

(4) The Circuit Court of Appeals erroneously decided that the Trial Court's failure to impose fines as part of its sentence upon petitioner in the first instance, was a "void act", and that therefore, it had the power to increase petitioner's punishment after he had entered upon the service of said sentence (R. p. 141a).

The overwhelming weight of Federal jurisprudence is to the effect that a failure of a Court to impose a fine in addition to imprisonment is but a mere "technical error" of which the prisoner cannot complain because it is favorable to him. *Matchok* v. *United States* (C. C. A. 3) 60 F. (2d) 266; *Jordan* v. *United States* (C. C. A. 4), 60 Fed. (2d) 4, 6, Certiorari denied, 287 U. S. 633, 77 L. Ed. 545,

33 Sup. Ct. 84; *Bartholemew* v. *United States* (C. C. A. 6) 177 Fed. 902, 906, Certiorari denied, 217 U. S. 608, 54 L. Ed. 901, 30 Sup. Ct. 697; *Flynn* v. *United States*, (C. C. A. 7), 50 Fed. (2d) 1021, 1022; *Linningen* v. *Morgan*, (C. C. A. 8) 241, Fed. 645, 648; *Nancy* v. *United States* (C. C. A. 9) 16 F. (2d) 872.

The sentence as originally imposed was not a nullity, and after petitioner had begun to serve it, the Trial Court was powerless to add to it. *United States* v. *Benz*, 282 U. S. 304, 307 (1931); *Roberts* v. *United States*, 320 U. S. 264, (1943).

(5) The Circuit Court erroneously decided that the charge in its entirety was a fair presentation of the case and without prejudice to petitioner (R. p. 142). The record shows that the Judge's charge was climaxed by an animated argument (R. pp. 109, 111). When the Trial Judge delivered that portion of his charge that commences with the words "But it also says this"—(R. line 25 p. 106) his manner and tone changed. His remarks which followed were accompanied by gesticulations, repeated striking of the desk for emphasis, and shouting. The record is not silent as to this. Counsel's objection mentioned "the intonation of the voice and the striking of the desk and other things" (R. pp. 109, 111). The Judge did not challenge counsel's assertion, but frankly admitted his "zealousness and hitting on the desk" (R. p. 105). The Judge emphasized that the trial was between the United States of America—"the government of the United States"—"this country of ours"—on the one side, and petitioner on the other (R. pp. 106, 107). The Judge in effect told the jury that the government of the United States—"this country of ours"—which constituted the one side, were: (1) him-

self, the Judge—(2) the jury—(3) "and 134 million other people trying to live in peace and amity and *under law*" (R. p. 106). It will be noted that petitioner was not mentioned as he was not on *that side*, and the jury must have gained the impression that petitioner was not trying to live —"under law."

Striking his desk as he made the following comment, the Judge thundered—"that government is entitled to protection *too*." (R. p. 106 The Judge in effect said, "Remember" • • • "Remember, I say,"—"that unpunished crime is also a threat to the continuance of this government; and while you consider and zealously consider the rights of the defendants, never for one moment must the rights of the people of the United States be sacrificed." (R. p. 106) This was palpably—an appeal to the jury, that they should not let their government down; an appeal to their patriotism and citizenship.

The Court appealed to the jury's sympathy asking them not to weigh—"a poor bedraggled female", and pointing to the defendants (petitioner) said:—"when you weigh *these men*, weigh them to see whether they are telling the truth." (R. p. 107a) (Petitioner had not testified)

Dramatically, he called the jury's attention to the oath they had taken and—"you called upon the living God to witness."

This Court has held in *Reynolds* v. *United States*, 98 U. S. 145, 168 that:

> "Every appeal by the Court to the passions or the prejudices of a jury should be promptly rebuked; • • • it is the imperative duty of a reviewing court to take care that wrong is not done in this way."

In *Allison* v. *United States*, 160 U. S. 203, at page 217, the Court said:

> "Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appropriate province of dealing with the facts invaded; and errors intervene which the pursuit of a different course would have avoided."

In *Quercia* v. *United States*, 289 U. S. 464, 470, this Court has held:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'"

This was a close case which rested upon the uncorroborated, unconvincing testimony of the accomplice, Ellen Vetto, an alcoholic. The portions of the charge complained of were practically the last words which the jury heard before they retired to deliberate. There can be little doubt that the Judge's animated argument did excite a prejudice which precluded a fair and dispassionate consideration of the evidence by the jury.

What the Trial Judge said and the manner in which he said it, after objection was taken, did not have the effect of removing the prejudice already imbedded. (R. p. 109) After the Trial Court's most definite and determined actions and assertions, it was hardly convincing for him to tell the jury—"I am giving you no intimation of how I feel." (R. p. 110)

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments herein of the Circuit Court of Appeals may be reversed and that petitioner may have such other and further relief in the premises as this Court may deem appropriate.

ZACHARY BOZZA,
Petitioner.

HAROLD SIMANDL,
Attorney for Petitioner.